ILE COPY

Office Supreme Court, U.S.
FILED
SEP [illegible] 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 451

WILLIAM W. MINER, JOHN H. X. POTTER, S. BAKER WILLIAMS, *Petitioners*,

v.

COMMERCE OIL REFINING CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,
Of counsel for the Petitioners

CORNELIUS C. MOORE,
SALVATORE L. VIRGADAMO,
FRANCIS J. BOYLE,
112 Bellevue Avenue,
Newport, Rhode Island.

JAMES A. HIGGINS,
WILLIAM C. DORGAN,
1204 Industrial Bank Bldg.,
Providence 3, Rhode Island.

CHARLES H. DRUMMEY,
85 Westminster Street,
Providence 3, Rhode Island.

Of Counsel

BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Rule of court, statutes, and ordinances involved	4
Statement	4
A. The Parties and the Pleadings	4
B. Location of the Properties Involved	6
C. The Corporation's Proposed Refinery	8
D. Facts Bearing on the Validity of the Ordinances and License	11
(1) Zoning and Building Ordinances and Amendments thereto	11
(2) Adoption of Licensing Ordinance	13
E. Facts Bearing on Whether the Operation of the Corporation's Proposed Refinery Will Constitute a Nuisance	17
(1) General Effects of the Refining Process	17
(2) Hydrogen Sulfide and Mercaptans	18
(3) Likelihood of Accidents	21
(4) Sulfur Dioxide	23
(5) Injury to Health	24
(6) General Refinery Odor	25
(7) Injury to Use and Enjoyment of Residential Property	27
F. The Opinions and Judgments Below	28
Reasons for Granting the Writ	31
Conclusion	41

Page

Map showing Jamestown and adjacent areas; the refinery use district; the location of petitioners' homes; and the distances involved, ...following p. 41

Appendices [separately bound]

Appendix A—Opinions below A1

(1) Opinion of the District Court A1

(2) Opinion of the Court of Appeals A27

Appendix B—Judgments below A47

(1) Original Judgment A47

(2) Order Denying Rehearing A47

Appendix C—Rule of Court, Statutes, and Ordinances Involved A48

1. Rule of Court A48

2. State Statutes A48

3. Municipal Ordinances A52

Appendix—Demonstrable Factual Errors in the Court of Appeals' Opinion A53

Appendix E—The Rhode Island Law of Nuisances ... A59

AUTHORITIES

[References to pages preceded by "A" are to the Appendices]

Cases:

Aldrich v. *Howard*, 8 R. I. 246 .....38, A59, A62, A64

Baumgartner v. *United States*, 322 U.S. 665 35

Berman v. *Parker*, 348 U.S. 26 31

Black & White Taxi Co. v. *Brown & Yellow Taxi Co.*, 276 U.S. 518 39

Blomen-Frederickson v. *N. Barstow Co.*, 35 R.I. 198, 85 Atl. 924 .....38, 39, A60, A62-A64

Boyd v. *Boyd*, 252 N.Y. 422, 169 N.E. 632 35

Brenci v. *United States*, 175 F. 2d 90 36

Erie R. Co. v. *Tompkins*, 304 U.S. 64 39

Euclid v. *Ambler Realty Co.*, 272 U.S. 365 .....29, 39

Page

Fish v. *Dodge*, 4 Den. 311 ..... A60
Gracer Mfg. Co. v. *Linde Co.*, 339 U.S. 605 35
Kennedy v. *Frechette*, 45 R. I. 399, 123 Atl. 146 ..38, A59, A61, A62, A64
Knauer v. *United States*, 328 U.S. 654 35
Lopez v. *Alcoa Steamship Co.*, 275 F. 2d 460 35
Oceanic Steam Navigation Co. v. *Watkins*, 188 Fed. 909 11
R. I. Home Builders v. *Budlong Rose Co.*, 77 R.I. 147, 74 A. 2d 237 33
Saunders v. *Shaw*, 244 U.S. 317 33
Schneiderman v. *United States*, 320 U.S. 118 35
Seidner, Inc. v. *Ralston Purina Co.*, 67 R.I. 436, 24 A. 2d 902 .....3, 30, 37, 38, A62
United States v. *Oregon State Medical Society*, 343 U.S. 326 35
United States v. *Yellow Cab Co.*, 338 U.S. 338 35
Universal Camera Corp. v. *Labor Board*, 340 U.S. 474 39

STATUTES:

Rhode Island General Laws, 1938:

Ch. 333, § 21 ..... A51
Ch. 333, § 52 .....13, 29, A50
Ch. 342, § 1 .....11, 28, A48
Ch. 342, § 2 .....11, 28, A49

Rhode Island General Laws, 1956:

§ 23-26-1 ..... A51
§§ 23-27-1 to 23-27-4 .....A50-A51
§ 23-27-2 .....13, 29, A50
§§ 45-24-1 to 45-24-5 .....11, 28, A48-A50

Rhode Island Public Laws:

Ch. 1762 of 1931 11
Ch. 2525 of 1950 ..... A50
Ch. 3233 of 1953 (1st Spec. Sess.) A51

Sherman Antitrust Act (15 U.S.C. §§ 1-7, 12, 15) ... 5

MISCELLANEOUS: Page

Federal Rules of Civil Procedure, Rule 52(a) 3, 34, 37, A48

First Circuit Rule 31 31

Ordinances of the Town of Jamestown:

Ch. XXXV A52
Ch. XLIV A52
Ch. 50 ..... A52

Payne, *Reminiscences of the Rhode Island Bar*, 105-106 40

Supreme Court Rule 23(1)(i) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

WILLIAM W. MINER, JOHN H. N. POTTER, S. BAKER WILLIAMS, ET ALS., *Petitioners*,

v.

COMMERCE OIL REFINING CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

WILLIAM W. MINER, JOHN H. N. POTTER, S. BAKER WILLIAMS, *et als.*, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on June 16, 1960.

OPINIONS BELOW

The opinion of the district court denying respondent's motion for summary judgment on petitioners' counterclaim (4 R. 419-426)[1] is reported at 22 F. R. D. 5.

---

[1] The Appendix Record consists of six printed volumes, separately numbered. Vols. 1 and 2 are paged consecutively from 1 to 1338, vols. 3-6 are paged consecutively from 1 to 1913.

The opinion of the district court on the merits (3 R. 56-84; *infra*, Appendix A, pp. A1-A27)[2] is reported at 170 F. Supp. 396.

The opinion of the court below (Appendix A, *infra*, pp. A27-A46) has not yet been reported.

JURISDICTION

The judgment of the court below (Appendix B, *infra*, p. A47) was entered on June 16, 1960. A timely petition for rehearing was denied on July 6, 1960 (Appendix B, *infra*, p. A47). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Petitioners, residents of a small Rhode Island town, counterclaimed for an injunction against the respondent corporation's proposed erection of a large oil refinery on two independent grounds, first, that its operation would constitute a nuisance, and second, that the ordinances and license purporting to authorize its construction were invalid. The district court granted petitioners relief on both grounds, holding in their favor as to the second because permission to proceed had been granted without a hearing. On appeal, the court below held that there was no nuisance, refused to pass on the validity of the ordinances and license on the ground that such determination was unnecessary to the disposition of the cause, and ordered dismissal of the counterclaim.

The first question is whether, by dismissing the counterclaim without even considering the second ground which the petitioners asserted (invalidity of ordinances and license), and which was adequate to support the district court's judgment, the court below so far departed from the accepted and usual course of judicial proceedings as to call for review by this Court.

---

[2] All of the Appendices to the present petition are bound separately, as permitted by Rule 23(1)(i).

2. On the nuisance phase of the case, the district judge heard many days of testimony by expert witnesses on both sides. Thereafter the district judge wrote a lengthy opinion in the course of which he set forth his reason for believing some of the experts and for disbelieving others. The court below, with only the paper record before it, reached a different result on its own independent evaluation of the expert testimony, while admitting that the evidence was in sharp conflict.

The second question presented is whether by so doing the court below violated the standards prescribed by Rule 52(a), F. R. Civ. P.

3. The Rhode Island law is that, "to justify an injunction, * * * the evidence must show clearly and convincingly that substantial damage to the complainant's property or business will be practically certain to result from the operation by the respondent of the business against which an injunction is sought." *Seidner, Inc.* v. *Ralston Purina Co.*, 67 R. I. 436, 451, 24 A. 2d 902, 909. In this case the United States District Judge for the District of Rhode Island, after stating the rule of that case, after quoting that passage, after expressing his awareness of the burden of proof it imposed, and after considering all of the testimony, was "satisfied that the operation of the refinery in the manner and at the location proposed by the plaintiff will cause a substantial diminution both in the values of the defendants' properties and in their enjoyment thereof as measured by the degree of comfort which the average man living in such a locality has the right to expect." The court below said that "it seems to us that the Supreme Court of Rhode Island would not sanction enjoining the erection of the plaintiff's refinery."

The third question presented is whether the court below was justified in substituting its own view of Rhode Island law over that of the United States District Judge for the District of Rhode Island in the light of his findings of fact and of the Rhode Island decisions on the law of nuisances.

RULE OF COURT, STATUTES, AND ORDINANCES INVOLVED

The rule of court, statutes, and ordinances involved are set out in Appendix C, *infra*, pp. A48-A52.

STATEMENT

This case arises out of a controversy between respondent, Commerce Oil Refining Corporation, hereinafter "the corporation", turning on whether the corporation has been lawfully authorized to construct and operate a large oil refinery on a wholly residential island in Narragansett Bay, and on whether such construction and operation would unreasonably damage the homes and the health of the petitioners, hereinafter "the residents". The questions presented by this petition involve the regularity of the proceedings by which the judgment of the United States District Court for the District of Rhode Island, granting the residents injunctive and declaratory relief, was reversed by the court below.

A. The Parties and the Pleadings

The present action was commenced by the corporation, presently insolvent (see p. 10, *infra*), which filed a complaint against the residents seeking judgments aggregating $34,000,000 (4 R. 353-360).

The first count, which was based on diversity of citizenship (4 R. 353-358), alleged that the corporation in September 1956 received a license from the Town of Jamestown to erect and operate an oil refinery in an area of the town zoned for such use, that the residents unlawfully combined and conspired to harass, delay, and prevent the corporation from exercising its right to operate its refinery, and that to effectuate their "unlawful combination and conspiracy" the residents formed and used an organization designated as Jamestown Protective Association. The corporation asked that the residents be enjoined from harassing the

corporation by suit or by any other means, and asked for damages, against each of the 17 residents, in the sum of $500,000 plus costs and exemplary or punitive damages.

The second count (4 R. 358-360) alleged the same conspiracy as a violation of the Sherman Antitrust Act, as amended (15 U. S. C. §§ 1-7, 12, 15), and asked for injunctive relief and damages, seeking from each of the 17 residents an award in the amount of $1,500,000 plus costs and a reasonable attorney's fee.

The residents—petitioners here—all live in Jamestown, although not all are registered voters there. They are, by occupation, a shipyard owner (4 R. 704), a letter carrier (4 R. 689), a machinist (4 R. 698), a warehouseman (4 R. 694), a registered nurse (4 R. 694), a school teacher (4 R. 698), two housewives (4 R. 701; also Virginia W. Wright), an insurance broker (4 R. 719), a retired physician (4 R. 582), a retired fireman (4 R. 683), a retired real estate executive (4 R. 597), a retired metal spinner (4 R. 701), two retired business men (4 R. 679, 680), and two retired Navy captains (4 R. 709, 728).

The residents answered (3 R. 18-22, 44-49; 4 R. 360-371) and counterclaimed (3 R. 22-40, 49-52). In their answers they asserted that the license on which the corporation relied was invalid, that the amendment to the zoning ordinance of the Town of Jamestown creating a refinery use district was invalid, and that the amendment to the Jamestown building ordinance whereby the corporation was excused from compliance with its terms was likewise invalid.

In their counterclaims, the residents alleged the invalidity of the license, the invalidity of the zoning ordinance, and the invalidity of the amendment to the building ordinance. They also alleged that the value of the homes owned by them would be substantially reduced and destroyed, and that their homes would be rendered unfit and uncomfortable for enjoyment by the erection and operation

of the corporation's refinery, and that the refinery will constitute a continuing nuisance. In their prayers the residents sought a declaratory judgment that the license and the amendments to the ordinances were void, and also sought injunctive relief against the corporation taking any further action under the license and under the amendments.

In its reply to the counterclaims, the corporation reasserted the validity of its license and of the ordinances (3 R. 40-43, 52-56). The corporation's motion for summary judgment dismissing the counterclaims was denied (22 F. R. D. 5; 4 R. 419-426).

When the case was reached for trial, the corporation announced in open court that it did not intend to offer any evidence in support of its claim of an illegal conspiracy by the residents (4 R. 435), and on the latters' motion the complaint was dismissed, with prejudice (4 R. 408-411, 432-433, 434-445). Earlier, in seeking a dismissal without prejudice, one of the corporation's attorneys had deposed that the corporation still intended to sue the residents if its refinery were not built (4 R. 399-400).

B. Location of the Properties Involved

"The town of Jamestown, Rhode Island, is coextensive with the island of Conanicut in lower Narragansett Bay. The island is a little over 9 miles long and is only slightly more than a mile wide at its widest point. Its area is 9.3 square miles and its permanent population is about 2,000." C.A. opinion, *infra*, p. A34.

The southerly portion of the island, which is farthest away from the proposed refinery, is known as Beavertail. It is generally unoccupied and overgrown; on it are located some deserted Government installations, an abandoned golf course, a small summer colony of little fishing cottages, and one year-round resident on a single farm. (2 R. 874t, 875t, 908-909t.)

The middle part of the island consists of an area called The Dumplings, where the most desirable summer homes are found, and where there are also a few year-round homes and an abandoned fort; and of that part which is the compact residential area of the town, where 75% of the permanent population resides. This middle portion of the island has a public water supply and sewer system. (2 R. 875t, 882t, 908t, 910t, 970t.)[3]

Both courts found (3 R. 72; *infra*, pp. A16, A34) that Jamestown "is primarily a residential, resort and farming area. At the present time, no industries of any kind are located thereon, and there are only relatively few business enterprises, such as retail shops, stores, gasoline filling stations and hotels. It enjoys considerable popularity as a resort area during the summer." During the summer season, the population of the island nearly doubles (2 R. 987t).

The refinery use district (see page 13, and map following p. 41, both *infra*) extends completely across the northerly portion of the island. The district court found (3 R. 72-73; *infra*, p. A16) that the area of this district, in which the corporation proposed to erect its refinery, is 814.72 acres, of which 604.72 were owned by it; and the remainder by other persons, including 8 of the petitioners, who have homes within the boundaries of the refinery use district. "At the time of the trial of this case there were sixteen (16) dwelling houses in said district, one having been destroyed by fire since September 27, 1956. [Ex. 20, 5 R. 1425.] The remainder of the land therein is vacant. While a small portion of it is swampy and overgrown with scrub, most of said land is cleared and dry. Eighty-five per cent of it was described in the testimony as good farm land, suitable for farming or home sites. [5 R. 1052-1055,

[3] The court below (*infra*, p. A34) erroneously shifted the most densely populated middle portion of Jamestown into the largely unoccupied Beavertail area to the south. See Appendix D, *infra*, p. A53.

1496; Ex. O, 3 R. 256.] South of said district and about two miles therefrom are at least one hundred forty-three homes in the Jamestown Shores development, so-called, and to the north and within about one and one-half miles therefrom are seventy-one homes, a summer hotel and a camp comprising eleven or twelve buildings." (3 R. 72-73; *infra*, pp. A16-A17; see 5 R. 1490-1491, 1494.)

"The defendant William W. Miner owns and resides on residential property which abuts upon the easterly end of said district. The remaining defendants are the owners and occupants of residential properties situated at points approximately two-thirds of a mile to four miles away from said district. The properties of the defendants Terrence McGaughan and Burgess Lunsford are located to the north of said district, and the properties of the remaining defendants to the south and southeast of said district. The homes owned by the defendants range in value from $4,000 to $50,000. Most of them, if not all, are substantially constructed, well maintained and attractively landscaped." (3 R. 73, *infra*, p. A17.) They run the gamut from small shore cottages on small lots to large residences of comfort and elegance on many acres of land; see pictures, 6 R. 1609-1669. See also 3 R. 213, 215, 235.

The geographical relationship between the properties involved is shown on Ex. 22, reproduced in facsimile following p. 41, *infra*.

C. The Corporation's Proposed Refinery

Following the testimony on behalf of the residents, and after introduction of Ex. LLL as the "complete design" "as of the present time" (4 R. 658, 659-662), the corporation presented evidence of substantial changes in the design of its refinery (3 R. 73; *infra*, pp. A17-A18; [1 R. 498t-502t, 518t-521t, 694t-701t; 5 R. 1268-1273]). The district judge said (3 R. 74; *infra*, p. A18), "For the purpose of my decision, I shall assume that these changes have been made. But despite these assumed modifications,

the evidence establishes that the proposed refinery will comprise, among other structures, at least fifteen stacks ranging from twenty to two hundred feet in height which will contain many thousands of feet of piping, countless joints and connections, nearly one hundred unfired pressure vessels of varying sizes and construction, approximately four hundred pumps, thousands of seals and compressors, tanks, heat exchangers, and like equipment." [1 R. 497t, 523-528t; 5 R. 1382-1383.]

The corporation proposes to "refine forty-three thousand (43,000) barrels of Kuwait crude oil each day in its refinery, slightly less than the total daily capacity of all the oil refineries in New England at the present time." (3 R. 74; *infra*, p. A18; [1 R. 91t; 6 R. 1801; Ex. MMM, p. 5 (not printed)]. "The crude oil to be refined will be brought by tankers from the Middle East to Jamestown. Plaintiff proposes to construct a landing dock off the east shore of the island from which the oil will be pumped through pipes to the crude storage area and then to the process units. [2 R. 744t-745t; Ex. JJJ, not printed.] The plans for the proposed refinery would seem to indicate that the crude oil will be kept at all times in an enclosed system from the time of its arrival through the completion of the refining processes." (3 R. 76-77; *infra*, p. A20; [1 R. 418t, 441t; Ex. MMM, 6 R. 1687 at 1689, 1701, and 1801 *et seq.*])
"The refinery will be operated twenty-four hours per day, seven days a week throughout the year, with brief shutdowns once a year for maintenance and repair purposes. [2 R. 780t.] The products to be produced are high octane gasoline, liquified petroleum gas (LPG), and heating fuel oils. By-products to be produced will be petroleum coke and elemental sulfur." (3 R. 74; *infra*, p. A18; [1 R. 82t, 141t; Ex. MMM, 6 R. at 1701, 1707, and 1801-1805].)

"Three types of processes will be used to convert the crude oil into gasoline, LPG and heating oils," viz., distillation, cracking, and heat treatment. (3 R. 74-75; *infra*, pp. A18-A19; [1 R. 393t-395t].)

In the various stages of the above processes large quantities of hydrogen sulfide, gaseous hydrocarbons known as mercaptans, and sulfur dioxide (SO_2) will be produced. (3 R. 75; *infra*, p. A19; [1 R. 422t, 436t, 441t, 444t].) The district judge, after giving "full credence" to the corporation's intention to use no fuel oils having a sulfur content in excess of $2\frac{1}{2}$ per cent, "and assuming that the sulfur recovery unit will operate at all times to its maximum efficiency," found as a fact that "it is clear that the minimal quantity of SO_2 to be discharged each day into the atmosphere will be thirty-seven tons." (3 R. 75-76; *infra*, p. A20; [2 R. 1017t-1023t, 1063t, 1245t; Ex. BBBB, 6 R. 1901-1913].)

"The evidence further shows that the plaintiff will draw large quantities of salt water from Narragansett Bay for cooling certain refinery units. The total amount so used will be at least 100,800,000 gallons each day. After circulating through the heat exchangers it will pass through a cooling pond and will be discharged into the bay. In addition, process water used in the refining processes and water used to wash platforms, walks and other areas in the processing units, amounting to more than 2,000,000 gallons each week, after treatment to remove certain hydrocarbon compounds with which it has become contaminated and after passing through an oxidation pond will also be discharged into the bay together with storm water accumulating in the processing units and in the crude storage area." (3 R. 77; *infra*, p. A21; [5 R. 1171-1175, 1305-1306].)

The facts as to the results that would accompany the operation of the refinery are set forth below under the nuisance phase of the case, *infra*, pp. 17-28.

The record establishes that, at the time of the trial, the corporation was insolvent, having real assets of $776,518.34 as against current liabilities of $2,081,736.79 (Def. Ex. MMM, 6 R. at 1741, 6 R. at 1747, note (6)). Of

its ten directors (2 R. 762t-765t), the only one who testified at the trial, Mr. Geller, was the one who for some years had been "engaged in the development and promotion of the Company" (2 R. 764t).

At present, so petitioners are advised, the corporation does not have any contract for the supply of crude oil or any firm commitment for financing construction.[4] In actual fact, the corporation has never during its entire existence operated any refinery anywhere (Ex. "B" to Ex. 12-c, 5 R. 1535, 1541).

D. Facts Bearing on the Validity of the Ordinances and License

(1) *Zoning and Building Ordinances and Amendments thereto*

The Town of Jamestown in August 1935 adopted a zoning ordinance. It was conceded that, since no notice of a hearing on its proposed adoption was given as required by the state law then in force (R. I. Pub. Laws, 1931, ch. 1762, later R. I. Gen. Laws, 1938, ch. 342, §§ 1 and 2, now R. I. Gen. Laws, 1956, §§ 45-24-1 to 45-24-5, *infra*, pp. A48-A50),[5] this ordinance was invalid when the amendment now in question, which created the so-called refinery use district, was adopted in September 1956 (4 R. 412-417, 483-484).

[4] At the hearing before the district court on August 8, 1960, on petitioners' application for a stay pending the filing of the present petition (see *Oceanic Steam Navigation Co.* v. *Watkins*, 188 Fed. 909 (C. A. 2), for the authority in the trial court to grant such a stay after the mandate of the court of appeals has gone down), petitioners' counsel made the assertion set forth in the text, in response to the demand of the corporation's attorneys that the stay be conditioned on the giving of a bond. They did not contradict that assertion, and the district court granted the stay without requiring security.

[5] The 1956 edition of the Rhode Island General Laws had not been published when this case was tried.

On June 29, 1956, the corporation applied to the Town Council of Jamestown (Ex. A-1, 3 R. 239-240) for

1. An amendment to Jamestown's zoning ordinance creating a "refinery use district";

2. An amendment to Jamestown's building ordinance excluding refinery structures from the Town's building code; and

3. An ordinance authorizing the Town to issue licenses for the refining, manufacture, processing and storage of petroleum products.

The corporation submitted proposed forms of these amendments and a form of notice for a public hearing on the zoning and building amendments (Ex. A-2, A-3, A-4, 5 R. 1546-1549). On August 28, 1956, a public hearing was held in connection with the zoning and building amendments (Ex. 8, 3 R. 106-164).

The corporation submitted three forms of amendments to the zoning ordinance (Ex. A-2, 5 R. 1546-1548; Ex. E and E-1, 6 R. 1556-1560; Ex. F, 6 R. 1561-1563); the last of these (Ex. F) was finally adopted (Ex. S, 3 R. 267-269; 4 R. 446).

The corporation resisted, on grounds of "spot zoning", a proposal to rezone only property for which it had an option (Ex. E, 6 R. at 1556-1558), and it characterized as "unnecessary" (Pl. Ex. 5, not printed in its entirety) a proposed amendment, drafted by the Town Solicitor at the direction of the Town Council, which would have permitted industrial uses in addition to refining in the proposed refinery use district (Ex. G, 6 R. 1563-1567; 4 R. 451-455, 566-567, 570). The latter amendment was not adopted (4 R. 455).

Independent counsel retained by the Town of Jamestown were joined by the Town Solicitor in refusing to express any opinion as to the validity or sufficiency of the proposed amendment to the zoning ordinance (Ex. Q and R, 6 R. 1583-1591, at 1589 and 1591).

One of the forms of amendment to the zoning ordinance proposed by the corporation was ultimately adopted by the Town Council on September 27, 1956 (Ex. S, 3 R. 267-269; 4 R. 464). This amendment created a refinery use district which straddled the northern portion of Conanicut Island, and contained more than 14% of the area of the Town (Ex. AAA, 6 R. 1671; 2 R. 863t, 865t, 869t-870t). Of the 814 acres in the refinery use district, tracts aggregating over 200 acres are not owned by the corporation (2 R. 863t, 869t-870t). See also p. 7, *supra*, and map following p. 41, *infra*.

On September 27, 1956, the Town Council also adopted the corporation's proposed amendment to the building ordinance, which excluded refinery structures from the provisions of the building ordinance (4 R. 464; Ex. T, 3 R. 269-270; cf. Ex. A-4, 5 R. 1549). Independent counsel retained by the Town, as well as the Town Solicitor, had earlier advised the Town Council that the amendment to the building ordinance was of "doubtful validity" (Ex. Q and R, 6 R. 1583-1591, at 1589 and 1591).

(2) *Adoption of Licensing Ordinance*

On the same day, September 27, 1956, the Town Council also adopted an ordinance which authorized the Town Council to issue licenses for the refining, manufacture, processing, and storage of petroleum products (Ex. U-1, 3 R. 270-279; 4 R. 464). As adopted, this ordinance did not differ materially from the drafts earlier submitted by the corporation (Ex. A-5, 3 R. 241-244), nor did it include any safeguards against air pollution as recommended by the Town Solicitor and the Town's special counsel (Ex. R, 6 R. at 1588 and 1591; 3 R. 200-204). This licensing ordinance, to the extent that it was, in substance and effect, a building ordinance, was not preceded by a public hearing as was required in respect of building ordinances by R. I. Gen. Laws, 1938, ch. 333, §52, now R. I. Gen. Laws, 1956, §23-27-2, *infra*, pp. A50-A51.

Protesting parties were denied any opportunity to testify in opposition to the licensing ordinance at the Town Council meeting at which it was adopted (Ex. 15, 3 R. at 200-202). Immediately after the adoption of the ordinance, the corporation's attorneys presented a license application (Ex. D, 3 R. 37-40), after which, without further discussion except to waive the requirement that the corporation file its plans with its license application (Ex. 15, 3 R. at 202), the license (Ex, DD, 3 R. 314) was issued.

The record shows that the public Town Council meeting at which the licensing ordinance was adopted and at which the license was issued had been preceded by a meeting of the Town Council in executive session, at which the procedure to be followed at the public meeting was determined (4 R. 480). At this executive session, held at 7 P. M. in the Town Clerk's office (3 R. 199), the town's attorneys for the first time, at 7:15 P. M., presented a form of licensing ordiance (4 R. 576), which had previously been approved by the corporation's attorneys (Ex. R, 6 R. at 1588).

The corporation's application for a license (Ex. W, 6 R. 1591-1594) and the proposed license (Ex. DD, 3 R. 314) were also considered at the executive session (4 R. 481). At that session, the Town Council also had before it typed resolutions moving adoption of the licensing ordinance, waiving the requirement under that ordinance (§§2(f), 2(g), 2(h), 3 R. at 271-272) that the license applicant first file plans, and granting the corporation's license application (4 R. 481, 576).

The meeting then adjourned to the Memorial Town Hall and Community Center—a different building (4 R. 577)—and reconvened in public session at 8:30 P. M. (3 R. 199). The Town Clerk brought with her to the latter meeting the Town's seal, as she had previously been directed to do by the Town Council (4 R. 482).

Here are the pertinent passages from the minutes of the public Town Council meeting (3 R. 201-202):

"Armbrust [Member of Town Council]: I move we pass this Ordinance as read.

"Seconded (Brooks [Member of Town Council])

"Moore [Counsel for Residents]: May we be heard on the question of this Ordinance; there has been no hearing on this Ordinance. As taxpayers and residents of the town we ask the right to be heard. We assume you wish to safeguard the health of this community.

"We are prepared to offer testimony which will point out to you the vital defect in this draft of the Ordinance; and I venture to say after you hear this evidence you may wish to withdraw and redraft this ordinance.

"Gobeille [President of Town Council]: It is the feeling of the majority of the Council that we have had the advice of a very competent engineer and very competent Counsel. We have their advice to us and we are following it. We would not change from their advice. We feel we should go ahead with our course of action as outlined.

"Moore: I would expect, of course, that you would follow the advice of your counsel and your expert, but certainly the residents of Jamestown whom we represent should be heard. The residents whom we represent have testimony to offer you based on this very draft of the Ordinance.

"Gobeille: The Council feels they have listened enough. They would like to get on with their action.

"Murray [Counsel for Corporation]: May I submit that at the time you draft an air and water pollution ordinance Mr. Moore be asked to submit his evidence.

"(At this point, Mrs. Tollefson [a resident and voter of Jamestown] tried to get the floor)

"Gobeille: The Council has not given permission for anyone to talk. We would like to get on with our action.

"May we have the vote? So Voted.

"Gobeille: We have before us an Application for a license to permit refining, manufacturing and processing of petroleum, petroleum products, etc.

(Quote Application)

"Armbrust: I move that the license as requested be granted; with the exception that the Council reserve the right to request compliance therewith when said plans and specifications have been prepared.

"Seconded and so Voted.

"Murray: I have here a certified check endorsed to the Town Treasurer, Town of Jamestown, on the Chase National Bank for $5000.00 in payment for the license.

"Meeting adjourned 9:05 P.M.

"Quinn [Counsel for Corporation]: We wish to thank you very much for your tolerance over many, many trying weeks; we are deeply grateful for the license you have issued this evening."

The record indicates that underlying the Town Council's haste was a deadline imposed by the corporation (Ex. 13, 3 R. 187 at 192-193; 4 R. 580-581; 5 R. 1443): "it had to be October 1st, no other date * * * if the deadline was not met, then the oil refinery would not come to Jamestown" (4 R. 581). In consequence, the licensing ordinance was "hastily prepared" (Ex. R, 6 R. at 1587).

Prior to the adoption of the ordinances and the issuance of the license, the corporation undertook to underwrite the fees of counsel[6] and of an engineer whose services would be required in the drafting of the necessary ordinances (Ex. H, 6 R. 1567, 1568), and thereafter the corporation promised to help out the Town in the event of litigation involving those measures (4 R. 580).

[6] For special counsel's bill for professional services in connection with all three ordinances, see Ex. AA, 3 R. 279-283.

Throughout the litigation, the corporation relied on the ordinances and on the license. See Complaint, Count I, ¶4, 4 R. 353; *id.*, Count II, ¶1, 4 R. 358; argument on production of documents, 4 R. 371-372.[7]

The record discloses, what is the fact, that before the corporation was able to obtain from the Town of Jamestown the amended ordinances and license on which it relied as authority to construct its refinery, it had sought similar permission to construct that installation in the Town of Portsmouth. The latter town is located in the northern portion of the Island of Aquidneck, which lies to the east of Conanicut Island, but also in Narragansett Bay (Ex. N, 3 R. 248, 251, 252; Ex. K, 6 R. 1573, 1574).

E. Facts Bearing on Whether the Operation of the Corporation's Proposed Refinery Will Constitute a Nuisance

(1) *General Effects of the Refining Process*

The court below said (*infra*, pp. A36-A37):

"There can be no doubt and indeed it is freely conceded by Commerce that substantial quantities of malodorous, and in sufficient concentration toxic, gases are generated in the process of refining crude oil, particularly 'sour crudes' such as those from the Shiekdom of Kuwait which Commerce intends to process in the refinery it proposes to build in Jamestown. These gases are hydrogen sulfide (H_2S) and a group of gaseous hydrocarbons called mercaptans. Furthermore the stacks carrying the exhaust from the various heaters essential to the refinery process

---

[7] "• • • I might say that, as alleged in our complaint, the Commerce Oil Refining Corporation received its permit to build a refinery on September 27, 1956, so that I am not asking anything prior to that date because I don't think we had any rights prior to that date. • • • I believe they should be limited as to time because the permit was granted on September 27, 1956. As I have stated to your Honor before, the plaintiff doesn't claim any rights prior to that date."

will discharge substantial quantities of sulfur dioxide (SO_2) into the atmosphere.[8] This gas is not peculiar to the operation of a refinery but, as a product of combustion, is present in varying degrees in most smokestacks. It has the odor of burned sulfur matches, is detectable by its odor in concentrations of 2.5 parts per million parts of air by volume and on constant exposure is deleterious to health in concentrations of 5 or more parts per million of air by volume."

(2) *Hydrogen Sulfide and Mercaptans*

Continuing the quotation from the court of appeals' opinion:

"We turn our attention first to hydrogen sulfide and mercaptans.[9] In accordance with general commercial practice about 1% of the sulfur in the crude oils Commerce proposes to refine will be removed in the form of hydrogen sulfide prior to shipment from the Middle East by a process known as stabilization. More of the sulfur will be converted in the course of the refining process into hydrogen sulfide and the residue will remain in the final products of the refinery. The hydrogen sulfide given off by the crude oil during the refining process will, according to Commerce's plan, be converted into odorless, elemental sulfur by a process which is about 96% efficient. The re-

[8] Estimated at a minimum of 37 tons a day by the district judge (3 R. 76, 80; *infra*, pp. A20, A23); see record references cited above, p. 10.

[9] According to the district court (3 R. at 75; *infra*, p. A19), "Hydrogen sulfide is a particularly malodorous gas described as having an odor like rotten eggs and as being detectable in very low concentrations. It is highly toxic and in sufficient concentrations injurious to health. Another inevitable product of the refining processes is the production of a group of gaseous hydrocarbons known as mercaptans. These are likewise particularly obnoxious and are detectable by smell in extremely low concentrations."

The court of appeals did not dispute the foregoing characterizations.

maining hydrogen sulfide will be incinerated and discharged into the air as sulfur dioxide.[19]

"Mercaptans are produced at various stages of the refinery process. In Commerce's operation some will be converted into hydrogen sulfide, which will be treated as described above, others will be removed by a caustic wash treatment and incinerated and some will be converted into hydrocarbons and form part of the gasoline and heating oils produced."

One basic difference between the parties at the trial, and between the district court and the court below on appeal, was whether the corporation's proposed refinery was likely because of accidents or otherwise to discharge unhealthy gases and unpleasant odors on the residents' properties, to their injury and discomfort.

The district court found (3 R. at 79-80; *infra*, p. A23),

"Here it is undisputed that obnoxious gases such as hydrogen sulfide and mercaptans will be produced in the refining processes. While the plaintiff contends that there will be no escape of these gases and cites the devices and procedures it will employ to contain them, neither the record nor the testimony of their experts sustains this contention. The most that can be said for said devices and procedures is that they will be nearly completely effective under the most ideal conditions. But having in mind the highly corrosive qualities of Kuwait crude oil and the volume of crude oil to be processed each day, I am satisfied that varying quantities of these obnoxious gases will find their way into the atmosphere at all times when the refinery is in operation. To assume that they

[19] The district court found (3 R. at 76; *infra*, p. A20) that, "When combined with water or moisture in the atmosphere, SO_3 becomes converted into sulphurous acid which in turn may be converted into sulphuric acid. These acids are highly corrosive to iron and steel and are destructive of plant life."

will not be carried by the prevailing winds beyond the relatively small area upon which a refinery of the size contemplated is to be located would be far from realistic. On the contrary, the credible testimony in this case establishes that said gases will be carried by the prevailing winds at all times to the properties of some of the defendants, and, because of their extremely disagreeable odors in very low concentrations and their cumulative effect, they will seriously diminish both the value of the defendants' lands as residential properties and the enjoyment thereof. The same observation may be made with respect to the general refinery odor described in the testimony as being an inevitable incident to refinery operation."

The court of appeals noted (p. A37, *infra*), that "No witness, of course, could say how frequently accidents permitting the escape of these gases in substantial quantity would be likely to occur."

The court of appeals went on to say (p. A38, *infra*), "Furthermore, assuming that accidents resulting in the discharge of these gases will occur in or near the center of Commerce's processing area, it is clear that if the wind at the time were blowing from any direction between northeast and south, the gases would not be carried onto the property of any defendant but out over the waters of the bay."[11]

The court of appeals had earlier noted (p. A35, *infra*) that "The prevailing winds over the island are from a generally westerly direction." The district court's finding (3 R. at 73; *infra*, p. A17) had been more specific—and more accurate (see Appendix D at p. A54, *infra*): "The evidence establishes that the prevailing winds on the

[11] The map of the island and of the residents' properties, *infra* following p. 41, shows that a wind blowing from the south would certainly carry the gases to the homes of the petitioners Lunsford and McGaughan. See Appendix D, *infra*, p. A54.

island are from the southwest and from the northwest. Wind velocities during at least a third of the year range from calm to fourteen miles per hour and fogs of varying duration enveloping the island occur with relative frequency."

(3) *Likelihood of Accidents*

There was substantial unanimity among the experts on both sides as to the likelihood of accidents in oil refinery operations.

Dr. Brooks, a consulting chemist (1 R. 122t-125t) called on behalf of the residents, testified that none of the processes in the corporation's proposed refinery plans were 100% effective, that "there is always the possibility of accidents of one kind or another" (1 R. 135t). Accidents involving the escape of odors, gases and smoke are "inevitable" (1 R. 136t), and "beyond any planning to prevent. They happen" (1 R. 137t): "The designers do all they can. But it is in the operation of the refinery and its equipment that these accidents are inherent and inevitable because of the general nature and hazardous nature of the whole refinery business" (1 R. 154t-155t). "In fact, accidents of one kind or another are inevitable, and because of the inherent hazards of the oil refining business, from beginning to end" (1 R. 191t). "It is inevitable from the very nature of the business, in spite of the best safeguards that can be conceived" (1 R. 192t).

Dr. Schutt, a consulting engineer (1 R. 195t-1 R. 198t) called on behalf of the residents, described refining as a "hazardous manufacturing operation" (1 R. 218t-219t).

Mr. Sutherland, the engineer who supervised the design of the corporation's proposed refinery (1 R. 373t-391t), admitted that "I don't think you can ever leave out the possibility that leaks will occur" (1 R. 530t), and that (1 R. 533t) "Human failure or human accident can occur and does occur, all the time. * * * throughout life I believe accidents, and so forth happen."

Dr. Brooks testified as follows as to the effect of accidents (1 R. 145t):

> "Q. May there be anything in the operation of a refinery which would give an increasing odor to the atmosphere after some months of operation? A. That goes to the question of human fallibility somewhat and the inevitability of accidents of various kinds. And if crude petroleum or any of these concentrated malodorous materials are for any reason spilled, their odor can be and is carried by the wind. And the more of that sort of thing that occurs, the day-to-day atmospheric pollution with respect to odor becomes more or less permanent and cumulative. It is sort of a cumulative effect.
>
> "The refinery might get along for some months without any accidents of that kind or any spinage or leakage of malodorous material, but when it occurs it isn't always easy to clean it up or stop it. So that as time goes on that effect may be cumulative and become greater."

The district court found (3 R. 79; *infra*, p. A23) that "While the plaintiff contends that there will be no escape of these gases and cites the devices and procedures it will employ to contain them, neither the record nor the testimony of their experts sustains this contention. The most that can be said for said devices and procedures is that they will be nearly completely effective under the most ideal conditions."

Notwithstanding Dr. Brooks' testimony, quoted two paragraphs above, the court of appeals concluded that (p. A39, *infra*) "the testimony is convincing that any general refinery odor remaining after an accident could be quickly eliminated by prompt and thorough cleaning of the area affected."

(4) *Sulfur Dioxide*

The district court found (3 R. 80-81; pp. A23-A24, *infra*):

"Insofar as SO_2 is concerned, it is abundantly clear that at least thirty-seven tons thereof will be discharged into the atmosphere each day. It is undisputed that this malodorous gas is detectable by smell in a concentration of 2.5 parts per million and that in concentrations of more than five parts per million it has an irritating effect of varying degrees, depending upon the health of an individual and the length of his exposure to it. In answer to a hypothetical question which included no recital of the volume of SO_2 to be discharged from the stacks of the proposed refinery, an expert witness for the plaintiff testified that the ground concentration of SO_2 at a point beyond the nearest property line of the defendant Froberg would not exceed 0.4 parts per million under the most unfavorable conditions, and hence its presence would not be detectable on his property or beyond it. [1 R. 612t-614t.] Under cross-examination, however, this same witness admitted that he could not determine such ground concentrations without knowledge of the volume of SO_2 that was being emitted by the stacks. [2 R. 1337t.] His opinion as to ground concentrations of SO_2 is in my judgment entitled to no weight. The credible testimony satisfies me that, depending upon atmospheric conditions, wind velocities, and the prevailing winds, as shown by the evidence of past annual weather conditions on the Island of Jamestown, there will be frequent concentrations of SO_2 on the property of the defendant Froberg in excess of 2.5 parts per million, and that it is reasonable to conclude that the properties of the other defendants will be frequently visited with similar concentrations carried to the premises by the prevailing winds, and that these concentrations will serve to effect a substantial diminution in the values of their properties and in the enjoyment thereof."

The court of appeals undertook (pp. A40-A41, *infra*) to believe the witness whom the district judge had disbelieved

on the grounds quoted above, and while admitting (p. A40, *infra*) that "The court's finding, however, has some foundation in the testimony of three experts", made an independent evaluation of the expert testimony to conclude (p. A41, *infra*) "that accepting the results of the formula there would be detectable concentrations of SO_2 on the Froberg property only for about one hour in every 720 hours, or for somewhat less than one hour in every period of four weeks."

(5) *Injury to Health*

The district court found that sulfur dioxide (3 R. 76; *infra*, p. A20) "in concentrations of more than five parts per million has an irritating effect upon the nose, throat and eyes. The extent of its irritant effect depends upon the length of one's exposure thereto. If the exposure be for only a few seconds, its effect may be only to produce tears. If exposure be prolonged, engorgement of the blood vessels of the eyes and irritation of the nose and throat result. In persons suffering from respiratory ailments or heart disease its effect is to aggravate such ailments and diseases and produce added discomfort."

This finding rested on the testimony of Dr. Leonid Snegireff, Associate Professor of Cancer Control at the Harvard University School of Public Health (5 R. 920-935, 950-951, 956-960; 5 R. 961-1013, 1016-1032). (See also this witness' testimony to the increase in lung cancer to be anticipated from petroleum refining in the area. 4 R. 958-959.)

There was also testimony by Dr. Wilhelm C. Hueper of the United States Public Health Service regarding the carcinogenic agents present in hydrocarbons that are waste products of oil refining (4 R. 870-912), but the district court made no findings thereon.

The court of appeals recognized (p. A36, *infra*) that the gases which the corporation's proposed refinery would generate were "in sufficient concentration toxic".

(6) *General Refinery Odor*

The experts on both sides were agreed that the plans of the corporation's proposed refinery contained no processes or units that were new and not used in other refineries (1 R. 132t (Dr. Brooks); 1 R. 219t-220t (Dr. Schutt); 1 R. 512t (Mr. Sutherland)). Mr. Sutherland, the designer of the corporation's proposed refinery, testified that its all-inclosed system was not new, that the systems of most if not all oil refineries were similarly inclosed (1 R. 522t).

The record shows that at least two features of the corporation's refinery, both of which are odor producing, would not be closed. The first was the oxidation tank, which must be open, and which causes odors (1 R. 246t-247t); the second was the coke storage area (Def. Ex. XXX, 6 R. 1879 [upper right-hand corner]). Petroleum coke is the end product of the conversion of residual stocks (2 R. 1023t-1024t, 1027t-1035t), and petroleum coke has a distinct smell (2 R. 1027t, 1086t).

No less than four experts testified that odors are normal and inevitable in, and inseparable from, refining operations.

(a) Dr. Reiman, a consultant in chemical engineering (1 R. 58t-61t), testified that offensive smells are certain to be present within an area of three or four miles from the corporation's proposed refinery, and that such odors are not separable from the refining process (1 R. 86t-88t).

On cross examination, he said (1 R. 113t), "A refinery always has a smell," and when counsel for the corporation countered with "You said that yesterday," Dr. Reiman replied, "I am saying it again today."

(b) Dr. Brooks, a consulting chemist (1 R. 122t-125t), testified that odors are normally created in the refining process (1 R. 132t); that the escape of odors even in a

modern and well-operated refinery, is inevitable (1 R. 138t); and that as time goes on, the odor becomes "more or less permanent and cumulative" (1 R. 145t).

(c) Dr. Schutt, a consulting engineer (1 R. 195t-198t), stated that there is a general refinery odor created during the refining process, caused by minor or more serious leaks, which can happen because of the multitude of connections; that these odors would be present in magnified form when a sour crude is being processed; and that these odors are perceptible leeward of a refinery for several miles (1 R. 219t-220t).

(d) Dr. Hueper, an officer of the United States Public Health Service (4 R. 870-874), said (4 R. 877) that refineries "have an odor all right. You can pick that up very nicely if you travel by train between Philadelphia and Wilmington. When you pass Marcus Hook, you smell that all right."

The district court found (3 R. 79-80; *infra*, p. A23) that, "having in mind the highly corrosive qualities of Kuwait crude oil and the volume of crude oil to be processed each day, I am satisfied that varying quantities of these obnoxious gases will find their way into the atmosphere at all times when the refinery is in operation. To assume that they will not be carried by the prevailing winds beyond the relatively small area upon which a refinery of the size contemplated is to be located would be far from realistic." The district court concluded that "the general refinery odor described in the testimony as being an inevitable incident to refining operations," would, like the other gases, "seriously diminish both the value of the defendants' lands as residential properties and the enjoyment thereof."

The court of appeals, in a passage too long for full quotation (*infra*, pp. A38-A39), minimized the possibility both of accidents and of general refinery odors.

(7) Injury to Use and Enjoyment of Residential Property

Two real estate experts with long experience (1 R. 268t-274t, 318t-321t), Messrs. Hurley and Milton, testified that the presence of the corporation's proposed refinery would render the properties of the several residents, particularly those closest to the refinery, "unfit for the comfortable enjoyment of life" (1 R. 285t) and "practically destroyed as a residence for people of normal sensibilities" (1 R. 339t), adding that some of the properties "would be practically annihilated as far as value is concerned" (1 R. 278t, 279t, 326t). See, generally, 1 R. 274t-288t; 1 R. 326t-341t.

On cross-examination (1 R. 354t) Mr. Milton testified:

> "XQ. Did you hear Mr. Hurley say that the value of the Miner property would be annihilated? A. Yes, I did.
>
> "XQ. Would you agree with that? A. I would, yes. That is directly across the road from the refinery and certainly it would have no value as a residential property, with a refinery across the street.
>
> "XQ. Would it have any residual value? A. There may be a practical basic shelter value left there, but not to persons of normal sensibilities.
>
> * * * * * *
>
> "The Witness: A bare shelter is a place to exist, in my opinion and not enjoy life. I think a home, a residence, is a place to have the comforts, enjoy life, health, and happiness with your family."

One of the corporation's real estate witnesses stated on cross-examination (2 R. 989t),

> "If it is constant, and they are living with this odor constantly, once a week or once a day or once every two weeks, I would think it would affect the value of it yes. I think—let me correct that. I think it would affect their enjoyment of the use of their property."

Dr. Reiman testified as follows on this issue (1 R. 89t):

> "Q. Doctor, as a result of your experience and observations, do you have an opinion whether or not

> the operation of this refinery will have any effect on the desirability of real estate in the neighborhood thereof * * * for residential purposes?
>
> "A. Well, I could answer you very easily on the desirability by saying that I wouldn't want to buy property or own a house within the 3- or 4-mile range of the refinery."

During the course of the trial, the district judge, accompanied by counsel for both sides, went to Jamestown and viewed the premises of all 17 residents, petitioners here (5 R. 1052-1055).

Following the close of the trial, the district judge said in his opinion (3 R. 83; pp. A26-A27, *infra*),

> "After a careful consideration of all the testimony and the reasonable inferences to be drawn therefrom, and recognizing the right of the plaintiff to make a reasonable use of its lands, I am satisfied that the operation of said refinery in the manner and at the location proposed by the plaintiff will cause a substantial diminution both in the values of the defendants' properties and in their enjoyment thereof as measured by the degree of comfort which the average man living in such a locality has the right to expect. It follows that such use will be unreasonable and hence a nuisance to the defendants against which they are entitled to injunctive relief."

F. The Opinions and Judgments Below

The district judge held (3 R. 61; *infra*, pp. A5-A6) that the amendment to the zoning ordinance, which provided for the creation of a refinery use district, was void because the basic zoning ordinance had not been validly adopted, and that, even if the amendment had been intended as an original ordinance, it would be void because not approved prior to adoption by a financial town meeting of the Town of Jamestown as required by R. I. Gen. Laws, 1938, ch. 342, §§ 1 and 2, now R. I. Gen. Laws, 1956, §§ 45-24-1 to 45-24-5, *infra*, pp. A48-A50.

The district judge held (3 R. 61-64; *infra*, pp. A6-A9) that the amendment to the building ordinance, which exempted oil refineries from all of the provisions of the Town's building code, was invalid because not conducive to the conservation of health, safety or welfare, and hence outside the scope of the police power, citing *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 387.[12]

The district judge held (3 R. 64-70; *infra*, pp. A9-A14) that the licensing ordinance, which admittedly was adopted without a hearing, was similarly invalid, because in substance it was a building ordinance which under R. I. Gen. Laws, 1938, ch. 333, § 52, now R. I. Gen. Laws, 1956, § 23-27-2 (*infra*, pp. A50-A51) requires a public hearing preceded by notice as a prerequisite to adoption. Since certain sections of the void ordinance, 5(a) to 5(h) inclusive, were intended to control the manner of constructing and equipping the refinery, and since the intention of the Town Council would not be served by the remaining portions of the license ordinance, which would leave the construction of the refinery without controls, the district judge held that the entire ordinance would fail notwithstanding the presence of a separability clause. Accordingly, he held that the license was also invalid.

In respect of the alleged nuisance, the district judge made detailed findings of fact (3 R. 72-83; *infra*, pp. A14-A26), most of which have already been quoted or summarized above, pp. 8-10, 19-20, 21-26, and then concluded with the ultimate finding (3 R. 83; *infra*, p. A26), quoted at p. 28, to the effect that

> "I am satisfied that the operation of said refinery in the manner and at the location proposed by the plaintiff will cause a substantial diminution both in the

[12] The Town's special counsel, joined by the Town Solicitor, had earlier advised the Town Council that the proposed building ordinance was of doubtful validity (Ex. R. 6 R. 1586 at 1589, 1591).

values of the defendants' properties and in their enjoyment thereof as measured by the degree of comfort which the average man living in such a locality has the right to expect."

Accordingly, the District Court entered a judgment (3 R. 84-85) declaring void the three ordinances and the license and enjoining the corporation from taking action under the ordinances or license, and also enjoining it from operating its proposed refinery in the Town of Jamestown, on the ground that such operation would constitute a nuisance.

The corporation appealed (3 R. 87).

On appeal, the court below held (pp. A33-A34, *infra*) that "Since, even if valid, neither the plaintiff's license nor the amendment to the local zoning and building ordinances would provide the plaintiff with a defense to the charge of constructing a private nuisance, it follows that there was no need for the court to pass on the validity of the ordinances, for decision of that matter was unnecessary to its disposition of the case."

The court below then (pp. A38-A41, *infra*) undertook a reexamination of the expert testimony and of the credibility of the expert witnesses; see pp. 19-26, above. On the strength of its reading of *Seidner, Inc.* v. *Ralston Purina Co.*, 67 R. I. 436, it said (p. A46, *infra*),

> "it seems to us from the *Seidner* case that the Supreme Court of Rhode Island would not sanction enjoining the erection of the plaintiff's refinery in Jamestown. Instead, on the relatively even balance of the sharply conflicting expert testimony in the record before us, we think the Supreme Court of Rhode Island would wait to see whether the refinery constituted a nuisance when put into operation."

The court below then remanded the case for entry of a judgment dismissing the residents' counterclaims in their entirety (*infra*, pp. A46-A47).

In a timely petition for rehearing,[13] the residents argued, *inter alia*, that (Pet. Reh. 1, 5-11) "The Opinion of this Honorable Court Failed to Consider and Determine Whether Defendants Are Entitled to That Portion of the Relief Granted by the District Court Independently of Its Decision on Nuisance and Based on Its Declaration That Certain Ordinance Amendments and Plaintiff-Appellant's License Are Invalid."

The petition for rehearing was denied (p. A47, *infra*).

REASONS FOR GRANTING THE WRIT

This Court, litigants have frequently been admonished, is a court of law and not of justice. If, therefore, the essence of the present petition were simply that, by reason of the judgment of the court of appeals, a presently insolvent corporation will be permitted, in a completely and traditionally residential area, to proceed with the construction and operation of an immense and particularly noxious oil refinery, an installation which on the evidence would be "an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn" (*Berman* v. *Parker*, 348 U. S. 26, 32-33), these seventeen individuals might well hesitate to invoke the aid of this Court to save their homes from being transformed into bare shelters.

Where, however, as in this case, the harm that is about to be visited on the petitioners flows from a disregard of hitherto unquestioned rules of law, then, we submit, the

[13] The judgment of the court below was entered on June 16, 1960 (*infra*, p. A47), the residents' petition for rehearing was filed on July 1, 1960 (*ibid.*). This was within the 15-day period allowed by Rule 31 of the First Circuit for the filing of a petition for rehearing.

persons facing spoliation may properly seek review—and redress—here. For the court below, in reaching the result of which these residents complain, has struck down and dismissed without consideration substantial grounds amply adequate to warrant and indeed require the relief which they sought and were granted at the trial, and has moreover, without seeing or hearing the witnesses, reevaluated a mass of highly technical expert testimony contrary to the conclusions of the experienced trial judge before whom it was adduced during a trial that lasted for over forty court days. It is these wholly unwarranted departures from, it is this utter disregard of, settled rules of judicial administration, that transform the private plight of these petitioners into a case of far-reaching public importance. For, in civil no less than in criminal litigation, it is only in the continuous observance of basic procedural safeguards that there can be assurance against injustice.

First. The court below held that there was no occasion for it to pass upon the validity of the ordinances or of the corporation's license, since neither would provide the corporation with a defense to the charge of constructing a private nuisance (*infra*, pp. A30-A34). We would not quarrel with that conclusion for a moment, even though those issues were tendered by the pleadings and then litigated at length (*supra*, pp. 5-6, 11-17), if the court below had affirmed the injunction entered by the district court on the basis of the latter's detailed findings that the corporation's proposed refinery would constitute a nuisance. But, once the court below set aside those findings, and on its own reevaluation of the expert testimony held that no nuisance would result, there still remained the allegations of the residents' counterclaims that the ordinances and the license, on which the corporation relied in its complaint and in its reply, were severally invalid.

Those allegations, if established, furnished ample grounds for the district court's injunction. The court below did

not undertake to review, much less overturn, either the district court's holding that the counterclaims stated a cause of action (22 F. R. D. 5; 4 R. 419-426), or its determination (3 R. 61-70; *infra*, pp. A5-A14) that the ordinances and license were each invalid. The court below did not (and, in view of *R. I. Home Builders* v. *Budlong Rose Co.*, 77 R. I. 147, 74 A. 2d 237, could not) question the residents' standing to sue. Nor did the court below hold that the corporation was free to proceed with its project even in the absence of a license. Instead, the court below simply dismissed the counterclaims in their entirety on the footing that the determination of the validity of the ordinances and license was unnecessary to a disposition of the cause.

We are at a loss to understand how or on what theory an appellate court may thus brush aside as unnecessary to its decision a ground for relief duly alleged, duly litigated, fully established, and amply adequate to support the relief granted at the trial. In the light of the petition for rehearing, this action, plainly enough, was not inadvertent; see Pet. Reh. 1, 5-11, quoted above, at p. 31.

What the court below did, therefore, was to deprive the petitioners of their independent cause of action without even considering its merits. That is more than an abuse of discretion, it is an actual abuse of power. Cf. *Saunders* v. *Shaw*, 244 U. S. 317. We submit that it constitutes such a far-reaching departure from the accepted and usual course of judicial proceedings as to call for—and to require—review by this Court. Indeed, on this phase of the case it would not be inappropriate for this Court to reverse without argument and to remand the cause for consideration of the ordinances-and-license aspects of petitioners' counterclaims.

Second. But the decision below involves another and equally serious departure from settled norms of judicial administration, the substitution by the court of appeals of its judgment upon and reevaluation of a mass of highly tech-

nical expert testimony that rested at critical points on the credibility of witnesses whom it did not—and of course could not—hear and observe.

1. The court below was fully aware (*infra*, p. A29) that "More than forty days of trial produced a record consisting of thousands of pages of testimony and hundreds of exhibits a great deal of both being highly technical in nature." No less than 24 expert witnesses testified on both sides over a period of 35 days. The trial judge took a view of all the properties involved (5 R. 1052-1055). Following conclusion of the trial, he made careful and explicit findings bearing on the issue of nuisance, basing his findings at several points on the credibility of the expert witnesses (3 R. at 80-81; *infra*, p. A24). On one of the crucial issues—ground concentration of sulfur dioxide gas by reason of the operation of the proposed refinery—he explained with particularity why he disbelieved the corporation's principal expert (3 R. at 80-81; *infra*, p. A24). Yet on a record of this kind, the court below, which admitted that the district judge's finding was supported by the evidence of three experts (*infra*, p. A40) and which admitted that in black-and-white the evidence was in sharp conflict (*infra*, p. A46), undertook an independent appraisal of the experts' testimony and of their credibility, and concluded that the operation of the corporation's refinery, which if completed will nearly equal the capacity of all the refineries now operating in New England (3 R. 74; *infra*, p. A18), would not constitute a nuisance in respect of these petitioners, more than half of whom have homes within a two-mile radius of the center of the proposed process area. See map following p. 41, *infra*.

2. Such retrial of a long and complicated case on the dead pages of a printed record is contrary to, and sharply offends, what has long been the settled practice, now codified in Rule 52(a), F. R. Civ. P. (*infra*, p. A48), a practice to which numerous cases in this Court have given un-

grudging effect. *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 341-342; and see particularly *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 339, where this Court quoted with approval the language of the New York Court of Appeals in *Boyd* v. *Boyd*, 252 N. Y. 422, 429, 169 N. E. 632, 634:

> "Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. * * * How can we say the judge is wrong? We never saw the witnesses. * * * To the sophistication and sagacity of the trial judge the law confides the duty of appraisal."

As this Court said on the same point in a fairly recent patent case (*Graver Mfg. Co.* v. *Linde Co.*, 339 U.S. 605, 610),

> "Particularly is this so in a field where so much depends upon familiarity with specific problems and principles not usually contained in the general storehouse of knowledge and experience."

Only a few months before the ruling now in question, the court below had likewise refused to disturb a judgment resting on the sharply conflicting testimony of expert witnesses. *Lopez* v. *Alcoa Steamship Co.*, 275 F. 2d 460, 461 (C.A. 1).[1] Even in denaturalization cases, which perhaps are *sui generis* in the lack of respect there accorded even concurrent findings of fact (*Schneiderman* v. *United States*, 320 U. S. 118, 158; *Baumgartner* v. *United States*, 322 U. S. 665, 673; *Knauer* v. *United States*, 328 U. S. 654, 657-658), the court below has held that it was not free

[1] "Solution of the question at issue rests entirely upon the credibility of the expert witnesses and that, of course, is a matter for decision by the court below before which the witnesses appeared and testified."

to reexamine credibility. See *Brenci* v. *United States*, 175 F. 2d 90, 94 (C.A. 1).[2]

3. Here the court below noted (*infra*, p. A40) that the district judge "specifically rejected the testimony of one expert witness with impressive qualifications by training and experience in problems of air pollution caused by refineries." This witness had, however, an even more more impressive disqualification: the district judge disbelieved him. And the trier of facts disbelieved him because that witness undertook to give an opinion in the absence of a factor without which accurate opinion was impossible. See 3 R. 80-81, quoted above at p. 23, where the record references are also given.

Unless, therefore, the maxim *falsus in uno, falsus in omnibus*, is now to be regarded as inapplicable to an expert retained by a corporation; the court below was not warranted in rehabilitating this witness's credibility.

4. In numerous significant respects, the court of appeals made demonstrable factual errors in the course of its independent reappraisal of the mass of evidence in the present record. In order not further to lengthen what is already a necessarily long document, we have relegated the details of these instances to Appendix D, *infra*, pp. A53-A59.

5. Moreover, the totality of the evidence in the whole record—briefly, very briefly, summarized at pp. 17-28, *supra*

---

[2] "* * * we do not interpret them [the *Schneiderman* and *Baumgartner* cases] as authorizing appellate courts to make independent findings of evidentiary facts of an objective nature when the credibility of a witness is an important factor in reaching a decision."

The *Brenci* case is cited in the opinion now sought to be reviewed (*infra*, p. A46, note 3) for the proposition that there is an appellate duty to examine the evidence to see whether it meets the requisite standard of proof. But no reference is there made to the page, just quoted, which reaffirms the traditional rule that this duty does not include any power to redetermine credibility.

convincingly demonstrates that it is utterly impossible to characterize as "clearly erroneous" (Rule 52(a)) the district court's ultimate finding (3 R. 83; *infra*, p. A26) that "the operation of said refinery in the manner and at the location proposed by the plaintiff will cause a substantial diminution both in the values of the defendants' properties and in their enjoyment thereof as measured by the degree of comfort which the average man living in such a locality has the right to expect." Very significantly, the court below admitted that the evidence on the cold record was conflicting (*infra*, p. A46), and that the testimony of at least three experts supported one of the district judge's crucial subsidiary findings (*infra*, p. A40).

6. The sum of the foregoing is that the court below, in reevaluating the expert testimony without having the expert witnesses before it, did just precisely what an appellate court should not do; what a tribunal without access to the witnesses can not do, particularly in a controversy turning on scientific knowledge; and what the court below has itself recognized that it can not and should not do.

Third. The court below committed another error requiring review, viz., the decision of an important state question contrary—in every significant respect—to applicable state law.

1. The court below read *Seidner, Inc.* v. *Ralston Purina Co.*, 67 R. I. 436, 24 A. 2d 902, as precluding the issuance of the injunction granted by the district judge against the anticipated nuisance of the corporation's refinery. But the district judge was fully aware of the *Seidner* case. He stated its rule (3 R. 71-72; *infra*, pp. A15-16), he quoted at the outset of his opinion (3 R. 72; *infra*, p. A16) its critical passage that formulates the quantum of proof required under Rhode Island law to enjoin an anticipated nuisance, and he showed his awareness of the burden accordingly resting on the residents (3 R. 78; *infra*, p. A22). He then

made an ultimate finding as to the harm which the corporation's refinery would wreak upon the residents and upon their homes (3 R. 83; *infra*, pp. A26-A27), a finding which brought the present case squarely within the *Seidner* case and thus within the Rhode Island law as to anticipatory nuisances.

2. Actually, this case and *Seidner* are not even fairly comparable, not only because the alleged nuisance in *Seidner* did not remotely approach what is shown on the present record, but also because the area there involved was not residential, as here, but had long been zoned for industrial uses. As we show in greater detail in Appendix E, *infra*, pp. A59-A64, under Rhode Island law it is the location which is important in determining the existence of a nuisance (*Kennedy* v. *Frechette*, 45 R. I. 399, 405, 123 Atl. 146, 148), and so nuisances in residential areas have never prevailed (*Aldrich* v. *Howard*, 8 R. I. 246; *Blomen*; *Frederickson* v. *N. Barstow Co.*, 35 R. I. 198, 85 Atl. 924; *Kennedy* v. *Frechette*, *supra*). The court below utterly failed to give proper weight to this factor.

3. Moreover, the Rhode Island law is that a disturbance need not be continuous to constitute a nuisance. "That the time of operation is limited, affects the extent of the injury but does not change the nature thereof." *Kennedy* v. *Frechette*, 45 R. I. at 406; 123 Atl. at 148; see *infra*, pp. A61-A62. Consequently the emphasis of the court below on the asserted lack of evidentiary support for the finding of a "continuous discharge" of sulfur dioxide (*infra*, p. A38), even if right—which, see Appendix D at p. A64, *infra*, we think it was not—reflects a further disregard of Rhode Island law.

4. Since, as has been noted, the court below held that the ordinances and license even if valid—i.e., municipal action regularly and lawfully taken—would not justify or neutralize a nuisance (*infra*, pp. A30-A34), it seems

plain on principle that the approval of the qualified voters which the court of appeals mentioned (*infra*, p. A35) can have no greater effect. Indeed, the court of appeals' reliance on that circumstance involves still another brushing aside of state law. For the Rhode Island law is clear that economic benefit to the general community will not legalize conditions that constitute a nuisance to individual complainants. *Blowen, Frederickson* v. *N. Barstow Co.*, 35 R. I. 198, 209-210, 85 Atl. 924, 928, quoted *infra*, p. A63.

5. Not only, therefore, did the United States District Judge for the District of Rhode Island correctly apply Rhode Island law, but, very plainly, the court below brushed that law aside. The court of appeals, inherently less well equipped to sense the "mood" (*Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 487) of the Supreme Court of Rhode Island, has, by undertaking to second guess a judge with nearly thirty years of practice in the courts of that State, actually reverted to pre-*Erie-Tompkins* days. While the technique of the court below professes to respect the law of Rhode Island, its result is in substance and effect a disregard of that law all too reminiscent of *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.*, 276 U. S. 518. Accordingly, review should be had on this issue as well.

Fourth. A generation ago, when this Court first sustained the constitutionality of zoning ordinances designed to protect residential neighborhoods against industrial encroachment, it remarked that "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388.

Here the court below has opened the doors of the parlor — in this instance one of the few beauty spots within easy access of a metropolitan area still remaining in New England — to the entry of a particularly filthy industrial

pig, a massive refinery that will spew forth chemicals and odors to endanger the health and to blight the homes of these residents.

Even as an original proposition, we find it well-nigh incomprehensible that anyone could say that a tremendous oil refinery would not render nearby houses uninhabitable or nearly so.[3]

Petitioners are seeking review, not because the court of appeals has ranged itself on the side of "modern progress"—a development once likened by a Rhode Island judge to a goose[4] which destroys all before and befouls all behind[4]—not because the court of appeals has closed its mind—and nose—to what everyone else knows—and smells—not even solely because it has shut its eyes to pleadings and to evidence in this record, but essentially because the court of appeals in doing so has disregarded settled rules of appellate procedure which, in every case save only this one alone, it has regularly applied.

[3] Dr. Reman, a consultant in chemical engineering (1 R. 58t-61t), who testified as to the inevitability of odors from an oil refinery (1 R. 86t-88t) and that "A refinery always has a smell * * * I am saying it again today" (1 R. 113t), said very bluntly (1 R. 89t) that "I wouldn't want to buy property or own a house within the 3- or 4-mile range of the refinery"—i.e., the corporation's proposed refinery in this case.

[4] Mr. Justice Shearman, a member of the Supreme Court of Rhode Island between 1854 and 1868. See Payne, *Reminiscences of the Rhode Island Bar* (Providence, 1885) 105-106.

CONCLUSION

The ruling below reflects a miscarriage of law no less than of justice. This petition for a writ of certiorari should accordingly be granted.

Respectfully submitted.

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,
Counsel for the Petitioners

CORNELIUS C. MOORE,
SALVATORE L. VIRGADAMO,
FRANCIS J. BOYLE,
112 Bellevue Avenue,
Newport, Rhode Island,

JAMES A. HIGGINS,
WILLIAM C. DORGAN,
1204 Industrial Bank Bldg.,
Providence 3, Rhode Island,

CHARLES H. DRUMMEY,
85 Westminster Street,
Providence 3, Rhode Island,

Of Counsel.

SEPTEMBER 1960.

[See map overleaf.]